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No. 83-978

In The
Supreme Court of the United States
October Term, 1983

SAMUEL MOORE AND COMPANY and
EATON CORPORATION,

Petitioners,

vs.

MULTIFLEX, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

B. R. Pravel
Thomas F. Marsteller
Pravel, Gambrell, Hewitt,
Kirk & Kimball

1177 West Loop South
Suite 1010
Houston, Texas 77027
(713) 850-0909

Counsel for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

The question stated by the Petitioners is not truly presented by this record because:

1. All elements of an attempt to monopolize were made out by the evidence.
2. There was a jury verdict finding a dangerous probability of monopolization.
3. The evidence showed severe barriers to entry in the market, and the jury was properly instructed to consider market power and barriers to entry.

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COUNTERSTATEMENT OF THE CASE

This case involves a virtual 100% monopolist. After a six week trial, the jury found Petitioners (hereinafter "Moore") had conspired with three other companies, had the specific intent to monopolize the relevant market, and had committed some act or acts in furtherance of its spe-

cific intent to monopolize which resulted in a dangerous probability of monopolization in the relevant market.[1]

The Court of Appeals for the Fifth Circuit reviewed the facts and agreed that under the factual situation presented, even though there was a substantial decrease in the percentage of the business of Petitioner over a two year span from 1977-1979, there was substantial evidence of a dangerous probability of monopolization by Moore in 1978. Although the factual situation may be "unique" because Respondent was able to survive and increase its percentage of total market *after the time* when the dangerous probability of monopolization by Petitioner occurred, the barriers to entry, the anticompetitive intent, the overt acts of Moore to destroy Multiflex, and its monopoly position when Respondent entered the market all establish conclusively the "attempt to monopolize" under Section 2 of the Sherman Act.

When Respondent[2] (hereinafter "Multiflex") first attempted to enter the relevant market of hose bundles in 1977, Moore was the only company manufacturing hydraulic hose bundles in the United States.[3] Although Moore only admitted to "at least an 80-85% market share", there were no other competitors in the relevant market, and Moore thus had a virtual 100% stranglehold on the market until 1978. 709 F. 2d at 984 (Footnote 4); App. A at p. 3a. Further, the evidence established that American Hose

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[1] See Jury Interrogatories 3, 4, 9, and 10; App. 2c, 4c and 5c.

[2] Under Rule 28.1, Multiflex U.K., Inc. and Multiflex Offshore Services, Ltd., are subsidiaries, and M.F.X. do Brazil Ltda. is an affiliate.

[3] Moore had been in that business since 1962.

and Reel, although it had attempted to get into the hose bundle business as a competitor of Moore several years before 1977, was already out of business by 1977. Although Moore denigrates its patent position now, this litigation was initiated by Moore bringing a patent infringement suit against Multiflex. The prior unsuccessful entrant, American Hose & Reel, likewise was sued for infringement of the same patent by Moore before it went out of business.

Another company, Vector Cable Co., a Schlumberger subsidiary, made some hose bundles prior to 1974 for a sister subsidiary of Schlumberger and then in 1977 considered getting into the business of making hose bundles but decided not to even try to enter the market after a study of the market. Although there was evidence that several U.K. manufacturers made hydraulic hose bundles, there was no evidence that any sales were made in the United States except where the bundles were for use in the U.K. under the "Buy U.K." policy of the British government.[4]

The evidence further established that in 1977 there were only three companies[5] in the U. S. in the business of buying hose bundles and reselling them with their own equipment on a turnkey basis, all of whom were located in Houston. The substantial monopoly position of Moore

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[4] Although Moore only admitted to having at least 80%-85% of the relevant market in 1977, there was ample evidence unrefuted by Moore that there was in fact no competition in the relevant market, and Moore was indeed a true 100% monopolist when Multiflex entered the market.

[5] Herein and in the Petition, the three companies are called "OEMs" because they were original equipment manufacturers of oilfield equipment with which the hose bundles were used.

with respect to sales of BOP hose bundles to the three OEMs thus resulted in Moore having a monopoly in the sale of hose bundles to the entire relevant market.

The arrangement which Samuel Moore had with the three OEMS goes back a number of years prior to 1977 and included a price multiplier which was used to discourage end users from buying directly from Samuel Moore (PX-14). This exclusionary barrier worked in the following way: Samuel Moore agreed with the three OEMs that if a request came to Moore from an end user for a price on a bundle, Moore would quote the end user by applying a "price multiplier" which it would multiply by the price Moore quoted for the same bundle to the OEM (PX-14). Since the OEM knew the price multiplier, the OEM therefore knew in each instance the quotation which was made directly from Samuel Moore to the end user. Accordingly, the OEMs would quote a price based on the multiplier, so that there was no price reason for the end user to purchase from Samuel Moore. Therefore, by design, the established channel for the purchase of hose bundles by the ultimate consumer when Multiflex entered the market in 1977 was through the three OEMs.

It was that established channel of marketing which Multiflex attempted to enter as a manufacturer in mid-1977 and in which it encountered its first exclusionary activity on the part of Moore.

The exclusionary activity included a conspiracy between Moore and the three OEMs to exclude Multiflex. The goal of the conspiracy was to eliminate the only potential competitor of Moore in the relevant market. 709 F. 2d at 988; App. A at p. 11a. Although an antitrust

conspiracy is rarely shown by direct evidence, Multiflex was able to produce Moore's own "smoking guns" with the result that there was ample evidence of a conspiracy to restrain trade. 709 F. 2d at 988; App. A at p. 10a. The jury likewise found that there was a conspiracy. App. C at p. 2c.

In addition to the conspiracy, the jury found Moore had a specific intent to monopolize the relevant market. Jury Interrogatory No. 9; App. C at p. 4c. The Fifth Circuit agreed. 709 F. 2d at 992; App. A at p. 18a, 19a. The evidence which supported the specific intent was a part of the "smoking guns" referred to by the Fifth Circuit in its opinion. For example, in a memo by Moore's national sales manager for hose bundles written in October, 1977 (PX-53), he wrote " . . . do we want to sit down with [the three OEMs] and see what we can all do to keep these other guys out of it?" Another memo by the dominant one of the three OEMs, written in October, 1977 (PX-14) when Multiflex was first trying to break the barriers of entry into the market, made the following telling statement:

> "We pointed out to Samuel Moore that they would have to accept the fact that someday, someone would offer them competition in the manufacturing of hose bundles. After much more discussion, in summary, we were told by Samuel Moore that they would do whatever was necessary to prevent Multiflex from entering into the hose business."

In January of 1978 after a meeting between Moore and all three OEMs, according to a Moore memo (PX-54), they all agreed that the day of the 1.7, 1.8 markup was gone and they hoped the days of high profit margins

would return, "but for the most part it is a war situation now." 790 F. 2d 987, 988; App. A at p. 9a.

As the Fifth Circuit observed in Footnote 14:

> "The testimony in the record suggests a long list of Moore's anticompetitive practices. In addition to the allegation earlier that Moore told customers Multiflex was insolvent and had Pinkerton guards posted at its gates, there is also evidence that detecting,[6] disparaged the quality of the Multiflex product, overstated the pressure ratings of its own competing products, and advised potential investors that the company had no customers." F. 2d 994, App. A at p. 22a.[7]

On March 7, 1978, the President of Moore wrote to the Executive Vice-President of the major OEM (PX-44), which OEM had 90% of the OEM business, and stated:

> " . . . [W]e are both anxious to do what we can to stop Multiflex from getting a foothold."

Then, on March 22, 1978, Moore brought a patent infringement suit against Multiflex, just one month before the big Offshore Technology Conference in Houston which is attended by most of the offshore users of hose bundles.

Henry Massey, Senior Vice-President-Lending Officer, for Republic Bank, Spring Branch, Texas, testified

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[6] Moore had an informant who was an inside employee in Multiflex who went by the code name, "Deep Throat". (PX-87) This contact informed Moore of Multiflex's business, and enabled Moore to know Multiflex's bids to customers.

[7] The text of Footnote 14 differs slightly in the Appendix to Moore's Petition as compared to the reported version at 709 F.2d at 994.

that his bank made an initial loan to McConkey in July, 1977 of approximately $350,000.00 to finance working capital for start-up expenses and for the down payment on the building at Magnolia, Texas. Massey learned from McConkey early in 1978 that "the traditional methods of marketing the flexible hoses was closed to [Multiflex]", and further that the patent infringement suit had been filed by Samuel Moore against Multiflex. He began to visit Multiflex every other week in mid-1978 to assess the approach the bank needed, such as whether to liquidate the loan, and force the company into bankruptcy. He was concerned about the adverse publicity of the lawsuit on the Dun and Bradstreet reports and the lack of sales by Multiflex of hose bundles through mid-1978. In mid-1978 McConkey attempted to get further loans from the Spring Branch bank for Multiflex, but after looking at the updated financial statements, Massey refused to grant any more loans. McConkey testified that he made efforts to get loans from other banks, including First City National Bank, Commerce Bank, Allied Bank and two different small business investment corporations. Multiflex was in such desperate straits in mid-1978 that McConkey attempted to negotiate the sale of his home to put the equity into the corporation, and he negotiated with Gates Rubber Company to extend further credit. John Yeager, McConkey's brother-in-law, decided in May of 1978 that it was necessary to make a loan from his personal sources of $200,000.00. He did this because they were a close family and he felt he could help McConkey in his desperate financial difficulties brought about by the patent infringement suit and Multiflex's exclusion from any sales to the three OEMs. The situation was so difficult for Multiflex that in the latter part of 1978 Yeager

helped McConkey work out a deal with Phillips Petroleum Company at Bartlesville whereby Phillips paid directly for the raw materials from Gates and Multiflex just billed for the work of making the bundles. This arrangement was brought about because Gates by then had put Multiflex on a cash basis for hose. In the meantime, the President of Moore, Bradford Burnham reported in a memo dated November 13, 1978 (PX-45) that he knew about the desperate financial condition of Multiflex and he initiated a telephone conversation with John Yeager in which Yeager reported to him the following:

> "He [Yeager] said they have been spending all of their time trying to keep alive. They had to close Hose Systems and they thought 'Multiflex could survive but didn't know that it could at this time'."

In PX-47, on December 15, the President of Moore recounted a detailed conversation which he had on the telephone with Don Miller of Gates as to the financial problems of Multiflex and in the next to last paragraph, Burnham stated:

> "Gates is counting on Bruce [McConkey] getting refinanced in some way. I assume Yeager is going to do this. I assume it might be advantageous for me to talk further with Yeager."

Yeager testified that he recalled that Burnham did call him about that date in December of 1978 and he told Burnham that his position had not changed since the first meeting that he had with Burnham and that he was going to continue to support Multiflex. In May of 1979, Yeager became the personal guarantor to the Spring Branch bank. An arrangement with a bonding agent was worked out in September of 1979 so that all funds received by

Multiflex were delivered to the Spring Branch bank, and such arrangement continued even up to the time of the trial.

Except for several sales to Cameron, which were forced by customers in 1979, Multiflex was unable to sell any hose bundles to any of the three OEMs in the years 1977, 1978 or 1979 (PX-190).

REASONS FOR DENYING THE WRIT

The courts have consistently held that "success" in obtaining or maintaining a monopoly is not a prerequisite to proof of an attempt to monopolize under Section 2 of the Sherman Act. If this were so, the attempt to monopolize provision of the statute would no longer exist and would simply equate to the monopolization part of the statute. Yet, this appears to be Petitioners' position.

This is not a case which requires this Court's supervision of the court below, or in which the court below failed to follow this Court's prior decisions. All of the traditional elements of an attempt to monopolize case under Section 2 of the Sherman Act were presented to the jury and were considered by the court below, including the market-shares of the parties. The court below quite properly rejected the proposition advanced by Petitioners, namely, that the percentage of the market was the *sole* controlling factor in determining whether there was a violation of the Section 2 prohibition against an attempt to monopolize.

Thus, neither the trial court nor the court below purported to establish any new rule of law or to depart from any old ones.

Contrary to Petitioners' contention, the jury was properly instructed regarding barriers to entry and there were barriers to entry implicitly found, partially evidenced by the existence of the monopoly of Petitioners in the relevant market even in the face of others attempting to enter the market prior to Multiflex. Petitioners held patents, one of which they used to its fullest exclusionary extent by initiating a patent infringement suit at a crucial time when Multiflex was a fledgling entrant into the market, and which Moore had previously used to keep out another fledgling entrant. Moore used its monopoly to force the only three OEMs in the business to conspire to exclude Multiflex with the intent and objective of selling the hose bundles at a monopoly price rather than a competitive price.

In evaluating the factual basis supporting the jury verdict in favor of Multiflex, the court below found that there was substantial evidence to indicate that Moore mounted a "vicious attack against Multiflex during the early days of Multiflex's existence, and that it was prepared to do 'whatever it takes' to remain 'number one' in the business." 709 F. 2d 993; App. A at p. 20a. This is thus a flagrant case of an attempt to monopolize with the facts so strongly against Petitioners that even though the percentage of the market began to shift in favor of Multiflex in the second year, the facts dictated an affirmance of the jury verdict. To have done otherwise would have rewarded an unsuccessful monopolist for vicious anticompetitive activities with a specific intent to destroy its only competitor and thereby maintain its monopoly.

Moore's position that the obtaining of 60% of the total relevant market by Respondent in the second year establishes, without more, that there were no barriers to the entry of Respondent, and therefore, ipso facto and as a matter of law, there could not be an attempt to monopolize under Section 2 of the Sherman Act ignores the facts of this case. Such position ignores the virtually total exclusion of all sales by Multiflex to the three OEMs during the entire period 1977 through 1979 even though Multiflex continued to try to sell to the OEMs.

Such total exclusion of Multiflex from the turnkey and replacement market of the OEMs had a drastic anti-competitive effect with respect to those customers who were willing to purchase only from the three OEMs on a turnkey basis. It is also bottomed on a false legal premise, namely, that success in the marketplace by a new entrant belies any barriers to entry and precludes a court from holding that there was a dangerous probability of monopolization, even though the evidence clearly established that Moore used its market power with a specific intent to drive Multiflex out of business and almost succeeded while Multiflex was a fledgling entrant in the market.

I. The Evidence Established That Moore Was A Monopolist, Had A Specific Intent To Monopolize, And Its Overt Acts Created A Dangerous Probability That It Would Succeed In Destroying Multiflex, Its Only Potential Competitor, And Thus Retain Its Monopoly In The Relevant Market.

All of the traditional elements to establish an attempt to monopolize under Section 2 of the Sherman Act were

presented to the jury and were considered by the court below. For many years until 1978, Moore enjoyed a dominant position in the hydraulic hose bundle market, controlling at least an 80% share of the U. S. market.[8] 790 F. 2d at 984 Footnote 4; App. A at p. 3a. The jury findings of Moore's specific intent to monopolize, its overt acts in furtherance of its specific intent to monopolize, and the dangerous probability resulting therefrom were adequately supported by substantial evidence. The court below dealt specifically with both the "dangerous probability" and the market shares issues in depth, and used the proper antitrust analysis in concluding as follows (709 F. 2d at 992; App. A at p. 18a):

> "The fact that a plan violative of the spirit of the antitrust laws ultimately fails does not inexorably lead to the conclusion that there was no 'dangerous probability of success.' As the court said in *Lektro-Vend Corp. v. Vendo Co.*, 660 F. 2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S. Ct. 1277, 71 L. Ed. 2d 461 1982: '[T]he Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense.' The time to examine 'dangerous probability' is when the acts occur. We do not accept the use of hindsight plus evidence of plaintiff's successful response to the defendant's acts to exonerate an antitrust violator who did cause damage to the plaintiff.
>
> "We find adequate evidence to support the jury's implicit finding that there was a 'dangerous proba-

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[8] The jury was instructed to consider barriers to entry and market power; under Rule 49(a), since specific findings as to barriers to entry and market power were not presented to the jury, the jury "shall be deemed to have made a finding in accord with the judgment on the special verdict."

bility of success,' when we look at the situation at the time of the violation. Viewing this appeal of a jury verdict in the manner most favorable to the verdict, we can state that Samuel Moore & Co. memos showed a clear intent to freeze Multiflex out of the market. We note that Moore told Multiflex's bankers and competitors that Multiflex's products were inferior, that the company was closing down, and that the plant had been shut in anticipation of bankruptcy with Pinkerton security guards posted at the door. Viewing the danger from the proper time perspective, we can find a sufficiently dangerous probability that Moore would have maintained its monopoly power through illegal means and would have frozen Multiflex out of the market. Multiflex amply demonstrated Moore's 'overt acts' in furtherance of the attempt to monopolize, and showed anticompetitive behavior from which a specific intent to monopolize can be inferred. The fact that Multiflex was able to overcome the hurdles Moore erected and established a strong market presence should not allow Moore to escape liability, although market success could be expected to affect the quantum of a damage award. We find that Moore's market position in 1977 plus its overt anticompetitive acts indicate a specific intent to monopolize and created a dangerous probability that Moore would injure both Multiflex and the open, public market place in violation of Section 2. This dangerous probability did not materialize because of the quality of Multiflex's product and the dedicated and imaginative way the company built a market for it.

"Finding each of the necessary elements to support the jury's verdict, we affirm the district court's holding of a section 2 violation."

Petitioners' approach ignores completely the antitrust analysis of "dangerous probability" by the court below and instead would ask this Court to focus solely on the market shares *after* the critical time when the fledgling

entrant, Multiflex, was dangerously close to being eliminated as a competitor by Moore.

Petitioners appear to be relying upon *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980), as they did in the court below to support its position that a decline in Defendant's market share precluded a finding of an attempt to monopolize violation. The court below carefully considered the *Nifty Foods* case and concluded that neither *Nifty Foods* nor any other case has suggested that a drop in Defendant's market share *alone* can defeat a claim of attempted monopolization. 790 F.2d 991; App. A at p. 17a. The court below pointed out that the Second Circuit in *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir. 1981), *cert. denied*, 454 U.S. 968 (1981) made it clear that a drop in market share does not defeat an attempted monopolization claim where there is evidence to support the claim. *See also Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 496 n. 18 (9th Cir.), *cert. denied*, 434 U.S. 1040 (1977); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Lektro-Vend Corp. v. Vendo Co.* 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

II. For Petitioners To Say There Were No Barriers To Entry Is To Ignore The Facts Before The Jury And The Court Below.

Petitioners have premised the issue in their Petition to this Court on the mistaken premise that there were no barriers to entry. Contrary to such assertion by Petitioners, there were several major barriers in addition to those barriers which Petitioners themselves attempted to create to prevent Multiflex from entering the market.

First, Moore had a number of patents, including the patent on which it brought suit that initiated the present litigation. That patent related to the very hose which was used in the hose bundles that were being marketed by Moore for a number of years in the commercial world, and which the industry had come to accept. Although Multiflex's supplier of the comparable hose, Gates Rubber Company was ultimately able to modify the hose construction so as to avoid infringement of that patent, the change did not deter Moore from bringing its suit in March of 1978 and continuing its suit for over a year thereafter. Moore dropped its patent infringement claim only after it apparently realized the seriousness of the antitrust counterclaim and recognized that continuing the patent infringement further strengthened the antitrust counterclaim against Moore by Multiflex.

Further, the same patent had been asserted several years before against another fledgling entrant, American Hose & Reel, which succumbed under the pressure of trying to break into the same market that Multiflex sought to enter.

The second and probably the most difficult barrier to entry that existed for any new entrant attempting to enter the hose bundle market was the established channel of marketing created by the close relationship between Moore and the three OEMs. The OEMs made the control equipment which was used at the well site, and Moore made the hose bundles that interconnected the OEMs' control equipment above the water surface to their well apparatus located below the water. As a result, the OEMs sold the control equipment and also the hose bundles to the end users as a turnkey system. Because of the pricing

arrangement between the three OEMs and Moore for many years prior to 1977,[9] all of the sales of Moore were to the three OEMs rather than to the end users. This meant that any new entrant into the hose bundle market had to either break that arrangement between Moore and the three OEMs, or develop new distribution networks for going to the end users directly.

The evidence in this case shows that Multiflex made the effort to go through the three OEMs, but the power of Moore over the three OEMs was demonstrated dramatically by the three OEMs promptly agreeing to make no purchases from Multiflex, after Moore threatened to disrupt their pricing scheme between Moore and the three OEMs by going to the end users directly (PX-14). The result was that Multiflex was deprived of all sales through the three OEMs through the years 1977 through 1979, except for several sales to one OEM in 1979 which were forced on that OEM by an end user who demanded that Multiflex be the supplier even though the system was a turnkey system from that OEM.

Further, the established channel of marketing was so strongly entrenched that even though there was an additional cost to the end user for the hose bundles by purchasing the turnkey system from the three OEMs, those sales continued even after the end users were made aware that Multiflex would sell directly to end users at a lower cost.

It is noted that Petitioners have cited the book by M. Porter in footnote 23 which specifically lists as a bar-

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[9] See detailed explanation of the pricing arrangement in the Counterstatement of the Case at page 4 of this brief.

rier to entry "access to distribution channels". In this case, the evidence is abundant and undisputed that Multiflex was denied access to the established distribution channels in the market through the three OEMs. Even though this is not entirely comparable to the "entrenched buyer preferences" discussed in P. Areeda & D. Turner, *Antitrust Law*, §409 at 302,[10] it has the same earmarks. Although that text indicates that such buyer preferences "will not ordinarily be a serious entry barrier", when that buyer preference is coupled with the established channel of distribution as in the present case, the expense of entering the market and breaking that relationship between Moore and the three OEMs was formidable enough so that even a strongly financed company such as Vector Cable Company, a subsidiary of Schlumberger, an international company, elected not to try to break into that market.[11]

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[10] "Many buyers of consumer goods—especially goods whose quality is neither apparent or cheaply sampled—will prefer the products of known or tried firms over those of new firms about which less is known. Past advertising and promotional expenditures, coupled with presumptively satisfactory products sold over a long period, can create consumer familiarity and even trust. Such preferences may be so entrenched that a new entrant must for some period of time either charge less or advertise more than established firms. The new firm may have to spend even more than established firms had to spend in the past when their advertising messages were left diluted by rivals. And even if a comparable investment would be sufficient to neutralize the established firm's advantages, there might be an entry barrier for the reason discussed in the previous Subparagraph." *Antitrust Law*, §409 at p. 302.

[11] Mr. Adams of Vector testified that a market investigation was conducted to determine the feasibility of entry into that market and based upon that investigation, Vector elected not to attempt to break the barrier.

The third entry barrier into the hose bundle market was the capital structure required to enter the market. This barrier is closely tied to the Moore-OEMs pricing arrangement and the established channel of business. The amount of money to enter this particular market was high compared to the potential market itself. Multiflex was able to obtain the small business loan of $350,000.00 which normally would have been adequate to enter the market if the sales could have been made by Multiflex through the established channel of business, namely, the three OEMs.

When that channel was blocked by the conspiracy between Moore and the three OEMs, then the capital requirements of Multiflex were increased by the added cost resulting from the necessity to go to the end users. The three OEMs were all located in Houston, where Multiflex was also located. To market the hose bundles to the three OEMs would have been a relatively nominal expense because only calls by Multiflex within the local area of Houston would have been required.

However, when the Moore-OEM conspiracy developed due to the pressure applied by Moore on the three OEMs, and also because of the self interest of the OEMs in excluding a new entrant who would disrupt their monopoly pricing structure, the start-up cost of Multiflex increased dramatically. In addition, Moore forced additional costs on Multiflex by bringing the patent infringement suit and by going to the end users, the only possible place of business left to Multiflex, and disparaging Multiflex's product and making false statements with respect to the product as well as telling potential customers that Multiflex was going out of business.

When Multiflex attempted to get more money by borrowing it from banks, Moore found that Mr. McConkey, the owner of Multiflex, was trying to get credit through its supplier of hoses, Gates Rubber Company, and also was attempting to borrow money from Mr. McConkey's brother-in-law. At that point, Moore further increased its stranglehold on Multiflex by discouraging further credit from Gates and financial support from Mr. McConkey's brother-in-law. Thus, it can be seen that Moore used the entry cost barrier to the fullest extent in this case in an attempt to destroy Multiflex.

Finally, and importantly, there was substantial circumstantial evidence in support of the jury verdict that there was a dangerous probability of monopolization in view of the exclusion of American Hose & Reel Company and the Vector Cable Company from entry into the market, which the court below characterized as "earlier entrepreneurial attempts to enter this market had met with a similar lack of success" [breaking the barrier of sales through the OEMs] 709 F.2d at 985; App. A. at p. 4a.[12]

By reason of Moore's monopoly power, it had successfully excluded all entrants prior to Multiflex. Moore's

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[12] Petitioners have made several gross errors in their brief. First, Multiflex did not construct a second plant because of "increased demand". The plant built in England by new investments of some of the shareholders was because of the government policy in the United Kingdom to "buy U.K.", which was to take advantage of sales made in England which could not be made by a company manufacturing in the U.S.

Petitioners are also misleading when they represent to the Court at page 16 of their brief that Multiflex had a 62% of the market "in only thirteen months". At the end of 1978, which was more than thirteen months after Multiflex entered the market, it had only about 30%, and Multiflex had *zero* sales to the three OEMs.

monopoly power permitted it to force the three OEMs into a conspiracy to exclude Multiflex, an illogical action on the part of the three OEMs which should have welcomed a competitor to supply them with hose bundles. But the threat of Moore breaking up the price arrangement by going directly to the end users with its sales put the three OEMs in the position of having to decide whether Moore could succeed in excluding Multiflex.[13] Multiflex, being a new entrant, was an unknown entity to the three OEMS and therefore they could not count on Multiflex surviving the tactics of Moore to exclude Multiflex from the market.[14] In addition to that, Moore assured them that "they would do whatever was necessary to prevent Multiflex from entering into the hose business" (PX-14). So, the OEMs agreed to exclude Multiflex from any sales to the OEMs, and they did that for the years 1977-79.

For Petitioners to say that Moore could not have maintained its monopoly even if it wanted to, is also to ignore the facts. Moore had excluded Multiflex from all of the sales to the three OEMs by the conspiracy, using its market power on those three OEMs. Moore had the wherewithal as a long established financial giant compared to Multiflex and was later backed by an even bigger giant, Eaton Corporation, following the acquisition of Moore by Eaton. Moore only had to succeed in

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[13] Barriers to entry can also be "barriers erected by [the defendant's] own business policies". United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 344 (D. Mass. 1953), aff'd. per curiam, 347 U.S. 521 (1954).

[14] This was reinforced by the earlier failure of others to enter the market.

cutting off the supply of hoses to Multiflex, which it attempted to do by the patent infringement suit, or destroy its reputation in the industry with the end users, which it attempted to do by falsely disparaging Multiflex's product and its ability to continue in business, or by destroying its financial resources, which it attempted to do by talking to Mr. Yeager, the brother-in-law of Mr. McConkey. And, it must also be remembered that Moore only had to destroy one potential entrant at that time, namely, Multiflex, and it would have maintained its monopoly.

Moore, while it was in the monopoly position, had engaged in monopoly pricing by reason of its arrangement with the three OEMs, and it had acknowledged that it had to reduce those prices during this "war situation" with Multiflex, but that someday they would return to those monopoly prices (PX-54). Moore's monopoly not only provided it with the power to control prices while it had the monopoly, but it also provided it with the power to exclude all competition with the three OEMs, even after Multiflex entered the market.[15]

As the court below recognized, even though the market shares in the two year period were at first blush surprising, they do not indicate in any measure a lack of

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[15] Moore was able to reduce prices from the supercompetitive level and take advantage of its economics of scale to produce the demanded level of output at the competitive price. Although Multiflex had positive margins of revenues over variable costs for 1977 through 1979, Multiflex did not make a profit (pre-tax) until 1979. The reason for this is (1) that the anticompetitive practices of Moore reduced Multiflex's revenues from both the sales price and volume and (2) Multiflex could not take advantage of the resulting economies of scale like Moore.

monopoly power by Moore, nor do they negate the substantial evidence that there was a dangerous probability of monopolization by Moore, no matter how the antitrust analysis is approached. Except for the decreasing market share of Moore, a more devastating and convincing set of facts can hardly be imagined for a Section 2 attempt to monopolize case. As the court below stated, "This is the stuff of which antitrust cases are made." 790 F.2d at 995; App. A at p. 23a.

III. This Is Not A Case In Which To Review The Ninth Circuit Cases Dealing With The Dangerous Probability Of Monopolization Under Section 2 Of The Sherman Act.

This Court has on a number of occasions had an opportunity to review the Ninth Circuit decisions dealing with the question of "dangerous probability of monopolization" in Sherman Section 2 cases[16] and has repeatedly declined to grant certiorari in those cases, as well as in other attempt cases originating from all circuits, the most recent and most notable being the *Inglis* case and the *Twin City* case. The Fifth Circuit in this case did not adopt the Ninth Circuit approach which has used "conduct alone" as the test for dangerous probability of monopolization. The jury was properly instructed with respect to market power, barriers to entry, the consideration to be given to the declining market of the De-

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[16] *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert denied*, 103 S.Ct. 364 (1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 57, 58 (1982); *Greyhound Computer v. International Business Machines*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

fendant, and the court below considered all of those factors in its affirmance of the jury verdict.[17] The court below was dealing with Moore as a monopolist which attempted to exclude its only potential competitor. If Moore had succeeded, and there was a dangerous probability that Moore would have succeeded in early 1978 (790 F.2d 992; App. A at p. 18a), Moore would have maintained its complete monopoly. The evidence in this case just does not support Petitioners' attempt to bring it within the Ninth Circuit's approach of "conduct alone" as the measure for dangerous probability under Section 2. This case does not provide a vehicle for any pronouncements with respect to the Ninth Circuit approach since that approach was not adopted or used by the Fifth Circuit in this case. In fact, a reading of the cases on this point decided by this Court and also the comments by the text book writers would indicate that this Court wisely has refrained from putting any straight jacket on the circumstances which can lead a court to find a violation of Section 2 of the Sherman Act. In no sense can it be said that the court below in this case failed to follow this Court's pronouncements with respect to violations of Section 2 of the Sherman Act.

Petitioners conclude with what they characterize their third and "perhaps most important" point by stating that the application of Section 2 without regard to Defendant's actual ability to achieve or maintain monopoly

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[17] Moore did not request any jury issues nor object at the trial level to the jury finding of market power. The jury specifically found the intent to monopolize (Jury Interrogatory 9; App. C at p. 4c) and acts in furtherance of its specific intent to monopolize which resulted in a dangerous probability of monopolization (Jury Interrogatory; App. C at p. 5c).

power "can have a devastating affect on the very competition Section 2 is intended to promote." As noted above, the facts considered by the jury and by the court below demonstrated conclusively that Moore in this case had the ability to maintain its monopoly power and it was dangerously close to completely obliterating Multiflex as its only competitor in early 1978. Thus, the statement urged by Petitioners for consideration by this Court is not applicable. Furthermore, if the overt acts of a monopolist intending to destroy its only potential competitor is to be accepted as permissible under Section 2 of the Sherman Act, there would be nothing of substance left to the "attempt to monopolize" statutory provision of Section 2. Such a decision would provide a safe harbor for the violator. It would strip the attempt offense of any independent significance and would leave a hollow in antitrust enforcement within which blatant and damaging anticompetitive conduct would be immunized.

Finally, Petitioners misquote *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978). The "overdeterrence" referred to by this Court had to do with the imposition of criminal liabilities under the Sherman Act ". . . without inquiring into the *intent* with which it was undertaken, . . .". [Emphasis added]. The specific intent in this case was established beyond a shadow of a doubt before the jury and was thoroughly analyzed by the court below.

The facts of this case do not justify review by this Court, and it is obvious that it is not a case in which the court below has failed to follow this Court's decisions. Neither this Court nor any appeals court has relied strictly on market shares to determine the attempt to

monopolize offense. Petitioners seek to have this Court adopt a view of the law which would encourage monopolists to use whatever means they had at hand to destroy a potential competitor. It is obvious that this is not a case which requires consideration by this Court for any reason.

IV. CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

B. R. Pravel
Thomas F. Marsteller
Pravel, Gambrell, Hewitt,
Kirk & Kimball

1177 West Loop South
Suite 1010
Houston, Texas 77027
(713) 850-0909

Counsel for Respondent

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